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In The

Supreme Court of the United States

October Term, 1975

STATE OF SOUTH DAKOTA,

Plaintiff

vs.

STATE OF NEBRASKA,

Defendant

MOTION OF ROBERT J. FOLEY, PHYLLIS K. FOLEY, AND OTTO ISAAK FOR LEAVE TO INTERVENE AS DEFENDANTS AND TO FILE COMPLAINT IN INTERVENTION AND BRIEF IN INTERVENTION AS DEFENDANTS.

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MOTION OF ROBERT J. FOLEY, PHYLLIS K. FOLEY, AND OTTO ISAAK FOR LEAVE TO INTERVENE AS DEFENDANTS AND TO FILE COMPLAINT IN INTERVENTION AND BRIEF IN INTERVENTION AS DEFENDANTS.

Robert J. Foley, Phyllis K. Foley, and Otto Isaak respectfully ask the court for permission to intervene as defendants and to file their complaint in intervention and brief in intervention in the above entitled action on the ground that movants' claim and defense in the main action have questions of law or fact in common with those asserted by the defendant, and state that the exercise of the court's discretion in permitting intervention will not unduly delay or prejudice the adjudication of the rights of the original parties.

Movants are the owners and in possession of a tract of land in Cedar County, Nebraska, described as:

> Rush Island in the Missouri River, said island being a part of Sections 5, 6, and 7, Township 33, Range 1

East, Cedar County, Nebraska, according to the original Government Survey and which is more fully and particularly described in the Surveyor's record No. 5, page 70 as follows: Commencing at the section corner of Sections 7 and 8, in Township 33, Range 1 East, Cedar County, Nebraska, as is located by the survey recorded in Surveyor's Record, Volume 4, page 29 of the records of Cedar County, Nebraska, thence running due north from this corner 5060 feet to the point of beginning designated as "A" on the attached map, thence running 710 feet north 81 degrees east, thence 805 feet north 68 degrees east, thence 942 feet north 59 degrees east, thence 326 feet north 88 degrees east, thence 874 feet north 84 degrees east, thence 362 feet south 54 degrees east, thence 305 feet north 58 degrees east, thence 1140 feet north 65 degrees east, thence 1315 feet north 5 degrees east, thence 805 feet north 60 degrees west, thence 1800 feet north 69 degrees west, thence 1225 feet north 72 degrees west, thence 2080 feet north 79 degrees west, thence 1390 feet north 57 degrees west, thence 1160 feet north 86 degrees west, thence 582 feet south 84 degrees west, thence 1090 feet south 55 degrees west, thence 1980 feet south 89 degrees west, thence 688 feet south 47 degrees west, thence 1400 feet south 20 degrees west, thence 1415 feet south 55 degrees west, thence 865 feet south 78 degrees east, thence 588 feet south 87 degrees east, thence 2220 feet south 72 degrees east, thence 2530 feet south 78 degrees east, thence 1890 feet south 62 degrees east, thence 425 feet south 71 degrees east to the point of beginning, containing 994 acres more or less, all in Township 33, Range 1 East in Cedar County, Nebraska,

to which their remote grantors acquired record title by patent dated March 28, 1865, to Rush Island in Sections 5 and 6, Township 33 North, Range 1 East, consisting of 147.65 acres and to which have been added accretions

from the Missouri River until said Island and accretions have developed into the land mass hereinabove described.

Intervenors contend that the premises above described are now and at all times have been located in the State of Nebraska as set out in the brief of the State of Nebraska.

Intervenors and applicants claim an interest relating to the location of the boundary between the states at the point where the island is located which is the subject of the main action, and that the disposition of the action may as a practical matter impair or impede applicants' ability to protect their interests unless adequately represented as intervenors in said action.

A plat of Township 93, Range 55 in Yankton County, South Dakota, was originally filed in the Office of the Register of Deeds of Yankton County, South Dakota, disclosing the location of the Missouri River along its southern border. Directly south and across the channel the original plat of Township 33, Range 1, East of the 6th P. M., in Cedar County, Nebraska, was filed in the Surveyor General's office at Leavenworth, Kansas, on February 18, 1863. This plat discloses the Missouri River along a portion of the north boundary of Cedar County and the existence of Rush Island, containing 147.65 acres in Sections 5 and 6 in said township and range. This survey also disclosed the location of Section 16, Township 93, Range 55 in Yankton County, Dakota Territory on the north side of the river.

Intervenors would sharply dispute plaintiff's statement that the main channel of the Missouri River flowed to the south of Rush Island in 1889.

Intervenors state that the aerial photographs referred to on page 3 of plaintiff's motion for leave to file their complaint together with an aerial photograph from the files of the Department of the Army taken on September 12, 1930, conclusively show the main channel of the Missouri River flowing along the north side of Rush Island and the south side of Yankton County as late as 1930 and then shifting by avulsion to the south side of the island.

In 1966, the United States Department of the Interior geological survey prepared maps locating Rush Island south of Yankton County in Cedar County, Nebraska, but north of the main channel of the Missouri River by that time.

The action of the River as it avulsed Rush Island to the north and developed a new channel to the south of the island, is readily demonstrated by the aerial photographs referred to by the plaintiff. As the channel developed, the flow of water north of the island gradually decreased until it finally left dry its old channel on the north side of the island except for an arm of the river which still runs along the north side of the island between the island and the South Dakota shore.

Intervenors assert that the record clearly supports the conclusion reached by the defendants and those here urged by intervenors, that Rush Island and its accretions reached the north side of the channel of the Missouri River by avulsion as a result of which the established boundary between the states did not change, but remained

the same because it was at the time of the original surveys and plats of the two states that the boundary was fixed by the Constitutions of the states of Nebraska and South Dakota and approved by Congress as the center of the main channel of the Missouri River.

That such an avulsion does not affect or change the boundary between states has been repeatedly held by this court. *Missouri v. Kentucky,* 11 Wall. 395, 20 Law Ed. 116; *State of Arkansas v. State of Tennessee,* 310 U. S. 563, 84 Law Ed. 1362. To the same effect are text statements supported by abundant authority in 72 Am. Jur. 2d, States, Sec. 27, page 431, where it is said, "In a case where a river has subsequently turned its course, and runs on the other side of an island, the boundary between the states remains as before and the island does not, in consequence of this action of the water, change its owner, even if the change occurred gradually and by natural means." See also *Nebraska v. Iowa,* 143 U. S. 359, 370, 36 Law Ed. 186, 190.

The real interest of the State of South Dakota in this litigation is to have this court so relocate the boundary between the states of Nebraska and South Dakota that instead of passing along the north boundary of the island as was adjudicated by a Yankton County Circuit Court it passes either through or to the south of the island so that the State of South Dakota through the Division of School and Public Lands can claim ownership and title under Article 8, Section 10 of the South Dakota Constitution and Section 5-3-9 of the South Dakota Compiled Laws of 1967, and thereby oust and evict intervenors from land

which they have owned for more than twenty years, and for which they have paid their predecessors full, fair consideration.

Wherefore intervenors ask the court for leave to intervene and leave to file their complaint in intervention and serve copies thereof upon the appropriate officers in South Dakota and Nebraska.

Respectfully submitted,

EVERETT A. BOGUE

Post Office Box 435
Vermillion, South Dakota 57069

Attorney for the Intervenors

In The

Supreme Court of the United States

October Term, 1975

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1975 No. 72, Original

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STATE OF SOUTH DAKOTA,

Plaintiff,

vs.

STATE OF NEBRASKA,

Defendant.

and

ROBERT J. FOLEY and PHYLLIS K. FOLEY, his wife as joint tenants and their survivor, and OTTO ISAAK,

Intervenors.

—o—

COMPLAINT IN INTERVENTION

Come now the intervenors in the above entitled action and allege:

I.

That intervenors claim an interest relating to the property or transaction which is the subject of this action, and

that they are so situated that the disposition of the action may as a practical matter impair or impede their ability to protect that interest unless applicant's interest is adequately represented by parties who are before the court.

II.

That the representation of intervenors' interests by existing parties is or may be inadequate and applicants are or may be bound by a judgment of this court in this action in that if this court decides that any part of Rush Island is within the boundaries of South Dakota, plaintiff will claim title thereto for the Division of School and Public Lands under the Constitution and Statutes of the State of South Dakota.

III.

Intervenors claim the following described real estate lies within the boundary and borders of the State of Nebraska, namely

> Rush Island in the Missouri River, said island being a part of Sections 5, 6, and 7, Township 33, Range 1 East, Cedar County, Nebraska, according to the original Government Survey and which is more fully and particularly described in the Surveyor's record No. 5, page 70 as follows: Commencing at the section corner of Sections 7 and 8, in Township 33, Range 1 East, Cedar County, Nebraska, as is located by the survey recorded in Surveyor's Record, Volume 4, page 29 of the records of Cedar County, Nebraska, thence running due north from this corner 5060 feet to the point of beginning designated as "A" on the attached map, thence runnig 710 feet north 81 degrees east, thence 805 feet north 68 degrees east, thence 942 feet north

59 degrees east, thence 326 feet north 88 degrees east, thence 874 feet north 84 degrees east, thence 362 feet south 54 degrees east, thence 305 feet north 58 degrees east, thence 1140 feet north 65 degrees east, thence 1315 feet north 5 degrees east, thence 805 feet north 60 degrees west, thence 1800 feet north 69 degrees west thence 1225 feet north 72 degrees west, thence 2080 feet north 79 degrees west, thence 1390 feet north 57 degrees west, thence 1160 feet north 86 degrees west, thence 582 feet south 84 degrees west, thence 1090 feet south 55 degrees west, thence 1980 feet south 89 degrees west, thence 688 feet south 47 degrees west, thence 1400 feet south 20 degrees west, thence 1415 feet south 55 degrees west, thence 365 feet south 78 degrees east, thence 588 feet south 87 degrees east, thence 2220 feet south 72 degrees east, thence 2530 feet south 78 degrees east, thence 1890 feet south 62 degrees east, thence 425 feet south 71 degrees east to the point of beginning, containing 994 acres more or less, all in Township 33, Range 1 East in Cedar County, Nebraska, and that intervenors are the record owners thereof

IV.

That Rush Island is and has been since the date of the original survey of Cedar County, Nebraska, a part of that recorded survey consisting of approximately 147.65 acres at the time of the survey, until by avulsion the main channel of the Misouri River moved from the north side of said island to the south side thereof, leaving Rush Island an undisturbed and identifiable tract as platted under the original government survey, and that through the years said river by accretion added land to and along the north side thereof until it reached its proportions as hereinbefore described.

V.

That by reason of the avulsion of the channel of the river to the south side of Rush Island the boundaries between the two states did not change but remained the same boundary as was established at the time of the original plats and surveys of Cedar County Nebraska and Yankton County, South Dakota.

VI.

That there at no time has been more than one island described and identified as Rush Island, and that the name of Elk Island is spurious, meaningless and of no effect whatever in identifying any tract or tracts of land, and that the accretion to the north of Rush Island accreted thereto as a result of the action of the Missouri River in through the years adding year after year, little by little in the form of bar or otherwise to the north shore of Rush Island.

VII.

That the contentions of the plaintiff are erroneous and have no basis in fact or law but are in reality an attempt to acquire for the State of South Dakota, a substantial tract of farm land which has been developed by intervenors and their predecessors in interest since the issuance of the Government Patent to Rush Island in 1865.

VIII.

That intervenors and their predecessors in interest have paid real estate taxes to Cedar County, Nebraska, for more than forty years without interruption or any claim of right title or interest on the part of Yankton County, or

the State of South Dakota, and that the one half interest in said premises acquired by the intervenors Foley was acquired by them with full reliance upon an opinion of the Attorney General of the State of South Dakota in 1965, and that in reliance thereon said intervenors have paid out many thousands of dollars.

Wherefore intervenors pray that it be adjudged and decreed as follows:

(a) That plaintiffs' complaint be dismissed upon its merits.

(b) That the real property described in paragraph three of intervenors' complaint is a part of the State of Nebraska.

(c) That the boundary between Township 93, Range 55, Yankton County, South Dakota, and Township 33, Range 1, East of the 6th P. M. in Cedar County, Nebraska, is the arm of the Missouri River which runs along the north shore of Rush Island and the south shore of South Dakota.

(d) That intervenors have such other and further relief as the Court may deem just and equitable together with their costs and disbursements herein.

Dated November 5, 1976.

Respectfully submitted,

EVERETT A. BOGUE

Vermillion, South Dakota

Attorney for Intervenors